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No. 00-601

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

SHARP ELECTRONICS CORPORATION
PETITIONER,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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NOVEMBER 17, 2000

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit departed by a wide margin from the accepted and usual course of judicial proceedings when it directed the United States District Court for the District of Maryland to enter summary judgment in favor of the nonmoving party after reviewing a sufficiently developed factual record, finding no dispute as to any material fact, and finding that the nonmoving party was entitled to judgment as a matter of law.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Deutsche Financial Services Corporation is a wholly-owned subsidiary of Deutsche Bank of the Americas.

Deutsche Bank of the Americas is a wholly-owned subsidiary of Deutsche Bank AG. The stock of Deutsche Bank AG is publicly held.

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STATEMENT OF THE CASE

1. The Agreement

Petitioner, Sharp Electronics Corporation ("Sharp") and Respondent, Deutsche Financial Services Corporation ("Deutsche Financial") were parties to a Floorplan Repurchase Agreement pursuant to which Sharp invited Deutsche Financial to finance certain transactions between Sharp and its wholesale customers.[1] App. at 7-10. By the agreement, Sharp offered to reduce Deutsche Financial's risk by repurchasing any financed merchandise that Deutsche Financial might find necessary to repossess upon default by Sharp's customer. *Id.* The agreement was a unilateral offer by which Sharp offered Deutsche Financial inducements, specifically agreements to reduce Deutsche Financial's risk, in exchange for Deutsche Financial's agreement to provide financing for ongoing transactions between Sharp and its customers. *Id.* at 7. Under the agreement, however, Deutsche Financial was not obligated to provide any financing. *Id.* Sharp and Deutsche Financial specifically agreed that "[T]his Agreement shall in no way bind [Deutsche Financial] to finance any Merchandise for [Sharp's] retail dealers. From time to time [Sharp] will inquire as to whether [Deutsche Financial] agree[s] to finance Merchandise for certain dealers." *Id.* at 7-10.

This case involves Sharp's invitation to Deutsche Financial to finance certain purchases by one of its customers, Montgomery Ward & Co., Incorporated ("Montgomery Ward"). Under the floorplan financing

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[1]The transactions at issue in this case were governed by Illinois law.

program established by the Floorplan Repurchase Agreement and other documents, Montgomery Ward would place a purchase order for merchandise with Sharp. Pet., App. at 31a; App. at 156. Sharp would telephone Deutsche Financial and request approval of the financing of the merchandise. Pet., App. at 31a; App. at 157. If Deutsche Financial elected to finance the transaction and if Montgomery Ward had not yet reached the limit of the floorplan program that was being administered by Deutsche Financial,[2] Deutsche Financial would approve the financing and issue an approval number to Sharp. Pet., App. at 31a. Sharp would then enter the approval number into its computer system, ship the merchandise to Montgomery Ward, and send an invoice to Deutsche Financial. Pet., App. at 32a; App. at 157. Deutsche Financial would pay Sharp the invoice amount, less an agreed upon discount. Pet., App. at 32a. Beginning in November 1996, Deutsche Financial required that Sharp send its financing requests in writing by facsimile transmission. App. at 159. Deutsche Financial, in turn, would fax its approval numbers to Sharp. *Id.* At the time of the events that are the subject of this dispute, facsimile transmission was the accepted and utilized means of communication between Sharp and Deutsche Financial. *Id.*; Pet., App. at 32a.

Only after Deutsche Financial approved a request for financing a specific transaction did it become obligated to perform under the terms of the agreement. App. at 7. However, even that obligation to pay was conditioned upon

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[2]Between April 8, 1991 and October 30, 1996, Deutsche Financial both administered the floorplan financing program and acted as one of the lenders under that program. As of October 30, 1996, Union Bank of Switzerland became the sole lender under the floorplan financing program. However, Deutsche Financial continued to serve as administrator of the program.

Sharp's warranty that the merchandise was subject to a bona fide order by Montgomery Ward and that Montgomery Ward had requested that the transaction be financed by Deutsche Financial. *Id.* Deutsche Financial's obligation to pay was further conditioned upon (i) Sharp's shipment of merchandise to Montgomery Ward within thirty days of Deutsche Financial's approval of the financing transaction; and (ii) Deutsche Financial's receipt of an invoice for the transaction within ten days after delivery of the merchandise. *Id.*

2. Montgomery Ward's Change In Financing Programs From Deutsche Financial To GE Capital

In early May 1997, Montgomery Ward held a meeting with a number of its significant vendors to discuss its deteriorating financial condition and its intention to consolidate its financing programs. App. at 225. Montgomery Ward announced its intention to transfer the administration of its floorplan financing program from Deutsche Financial to General Electric Capital Corporation ("GE Capital"), a shareholder of Montgomery Ward. Although no representative of Sharp attended the meeting, Sharp's Vice President of Credit and Treasury Services, Ronald R. Papke ("Papke"), learned of it through reports from other vendors who were present and from documents distributed by Montgomery Ward to Sharp referencing the projected consolidation of financing with GE Capital. App. at 226-28. Sharp received formal notice of the change in Montgomery Ward's financing arrangements on May 22, 1997, when Montgomery Ward faxed Sharp a letter stating that, effective May 23, 1997, the administrator of the inventory finance facility would be changed from Deutsche Financial to GE Capital and that Deutsche Financial would not issue approvals after May 23, 1997. App. at 93, 94.

3. New Financing And Shipping Terms

On May 23, 1997, Deutsche Financial faxed a letter to its designated contact person at Sharp, Papke, announcing the termination of its financing role with Montgomery Ward and setting deadlines for future transactions in light of that termination. App. at 97. Specifically, Deutsche Financial advised Sharp that it would consider requests for financing of purchases by Montgomery Ward only through the close of business on May 23, 1997. *Id.* Deutsche Financial conditioned its offer of financing through the balance of the day upon a shortened shipping deadline, requiring that all merchandise thereafter financed by Deutsche Financial be shipped to Montgomery Ward by May 28, rather than within thirty days of approval. *Id.*; Pet., App. at 33a. Shortly after sending the letter announcing the termination of its financing role and setting the new deadlines for future transactions, Deutsche Financial faxed Sharp's credit administrator an approval to finance merchandise worth $56,683, for which Sharp had submitted a request for financing approval four days earlier. App. at 112-14. Thereafter, Sharp's credit administrator submitted a new request to Deutsche Financial, seeking approval of financing for almost $2.2 million worth of merchandise that Montgomery Ward had ordered. App. at 99-109. Later that same day, Deutsche Financial returned a fax approving the financing of that $2.2 million transaction. App. at 116-27. Although Papke was out of the office on May 23, 1997, he returned on the following Tuesday, May 27, 1997, and read both letters, from Montgomery Ward and Deutsche Financial, announcing changes in the financing program and the new financing and shipping conditions. App. at 294-96, 121-22, 129-30. After reading the May 22 and May 23 faxes, Papke discussed the changes in financing procedures with Sharp's credit administrator before any goods were shipped to Montgomery Ward. App. at 244-46.

4. Sharp's Performance

On May 28, 1997, Sharp shipped to Montgomery Ward $945,488 worth of merchandise that had been approved for financing by Deutsche Financial. Pet., App. at 34a. Sharp shipped the remaining $1.3 million worth of merchandise on May 31, 1997, three days after the deadline imposed by Deutsche Financial in its May 23 fax. *Id.* When Sharp submitted invoices for payment to Deutsche Financial, Deutsche Financial financed the merchandise shipped on May 28, 1997, but refused to finance the shipment made on May 31, 1997, because it was not in accordance with the terms of the May 23 fax. Pet., App. at 34a-35a Thereafter, Sharp asked Montgomery Ward to treat the inventory shipped on May 31, 1997, as purchased on open account and to pay for it in the ordinary course of its business. App. at 249-51. Montgomery Ward agreed, but later defaulted on its obligation to pay Sharp for the merchandise and subsequently filed for protection under Chapter 11 of the Bankruptcy Code. Pet., App. at 35a. Only after Montgomery Ward filed for bankruptcy protection did Sharp assert that Deutsche Financial was in breach of the Floorplan Repurchase Agreement by refusing to finance the orders shipped after the May 28, 1997 deadline. App. at 261-62.

5. District Court Proceedings

On January 28, 1998, Sharp commenced suit against Deutsche Financial by filing a one-count complaint without a demand for jury trial, alleging that Deutsche Financial breached an agreement for financing with Sharp and, accordingly, was liable for $1,312,949.90 in damages. Pet., App. at 35a. Deutsche Financial answered the complaint, denying liability and praying for judgment in its favor. On November 9, 1998, Sharp filed a motion for summary

judgment. Sharp supported its motion with twenty-one exhibits, including an affidavit, excerpts from ten depositions, and relevant documents. Deutsche Financial opposed that motion, arguing that Sharp was not contractually entitled to payment and not entitled to summary judgment. Deutsche Financial supported its opposition with twenty exhibits, including an affidavit, excerpts from six depositions, and relevant documents.

On January 29, 1999, the United States District Court for the District of Maryland issued a memorandum and order granting Sharp's motion and entering judgment in favor of Sharp and against Deutsche Financial in the amount of $1,394,705.11. Pet., App. at 1a-11a. In reaching its decision, the district court concluded that Deutsche Financial was contractually obligated to provide financing and found that Deutsche Financial breached that agreement with Sharp. Pet., App. at 7a. The court found that Deutsche Financial's May 23 fax was an attempted modification of the financing agreement, unsupported by valid consideration. *Id.* The court concluded that Sharp had not expressly accepted Deutsche Financial's offer and did not accept by performance because Sharp's actions were consistent with the terms of the existing agreement. *Id.* Deutsche Financial moved to alter or amend the judgment on April 14, 1999. That motion was denied.

6. Court Of Appeals Proceedings

On April 22, 1999, Deutsche Financial filed an appeal to the United States Court of Appeals for the Fourth Circuit. The entire factual record was before the court of appeals, including all of the exhibits relied upon by the parties before the district court. On June 20, 2000, the court of appeals issued its opinion vacating the judgment of the district court and remanding the case with instructions to enter summary

judgment in favor of Deutsche Financial. Pet., App. at 29a-47a. In reaching its decision, the court of appeals found that Deutsche Financial was not contractually obligated to finance the $1.3 million worth of merchandise which formed the basis of Sharp's complaint. Pet., App. at 45a. The court of appeals concluded that the May 23 fax was a rejection of Sharp's unilateral offer contained in the Floorplan Repurchase Agreement and a new offer from Deutsche Financial to provide financing on new terms. Pet., App. at 42a-43a. As it was undisputed that Sharp had actual knowledge of Deutsche Financial's counteroffer and performed by shipping $2.2 million worth of merchandise to Montgomery Ward, the court of appeals concluded that the case could be decided on the undisputed facts in the record. Pet., App. at 45a-46a. The court of appeals applied well-established principles of Illinois contract law to the undisputed facts of the case and held that Deutsche Financial had not breached its contract as a matter of law. Pet., App. at 36a-38a, 42a. The court of appeals vacated the district court's judgment and remanded with instructions to enter judgment in favor of Deutsche Financial.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The petition for a writ of certiorari should be denied because the court of appeals did not depart from the accepted and usual course of judicial proceedings when it directed the district court to enter summary judgment in favor of the nonmoving party, after finding that there was no dispute of material fact and that the nonmoving party was entitled to judgment as a matter of law. This practice has been widely recognized and applied since the inception of the Federal Rules of Civil Procedure.

1. The History Of Federal Rule 56

The federal rules were designed to eliminate the adherence to needless formalities and antiquated practices. 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1002 at 15-16 (2d ed. 1987 & 2000) ("Wright & Miller"). Fed. R. Civ. P. Rule 56 ("Rule 56") applies to all actions and is intended to be used as a method of promptly disposing of actions in which there is no genuine issue of material fact requiring trial. Fed. R. Civ. P. 56 advisory committee's note (1937). Commentators noted early on that a cross-motion for summary judgment is not a prerequisite to the entry of judgment for a nonmoving party. 6 James Wm. Moore, *Moore's Federal Practice* ¶ 56.12 (2d. ed. 1953 & Cumm. Supp. 1997); Charles E. Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567, 570-71 (1952); Roy W. McDonald, *Summary Judgments*, 30 Tex. L. Rev. 285, 303 (1952); Joann R. Locke, *Comment, Summary Judgment*, 25 Wash. L. Rev. 71, 76 (1950) ("'since the purpose of summary judgment is to expedite the disposition of actions in which there is no genuine issue of fact requiring trial, it would seem that the court may properly enter summary judgment in favor of the party entitled to [it] . . . .'") (citing *Hooker v. New York Life Ins. Co.*, 66 F.Supp. 313 (N.D.Ill. 1946), *rev'd on other grounds*, 161 F.2d 852 (C.C.A. 7th Cir.), *cert. denied*, 332 U.S. 809 (1947).

A proposed 1955 amendment to Rule 56(c) would have added a sentence explicitly codifying the recognized procedure that "[s]ummary judgment, when appropriate, may be rendered against the moving party." 11 James Wm. Moore, *Moore's Federal Practice* § 56 App. 03[1] at 56 App. - 5 (3d ed. 2000). The Honorable Charles E. Clark, one of the drafters of the Federal Rules of Civil Procedure, commented that:

> [T]he Advisory Committee hesitated to authorize such a

> judgment [when no cross-motion was made] without formal request therefor and has left what I fear is an ambiguity and a slight leaning toward formality . . . . [T]he trend of rulings in the district courts is to hold the formal motion here unnecessary. This is an instance where, seemingly, the judges on the firing line have reached a better result than that suggested by inhibitions of the drafting committee.

Clark, *supra*, 36 Minn. L. Rev. at 570-71. *See also Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 119 (1955) (Nordbye, J.) ("I am heartily in accord with the sentence added to Rule 56(c) enabling the Court before whom a summary judgment motion is pending to enter judgment for or against the party making the motion. Most federal courts have already assumed that authority.").

Despite the overwhelming support for a modification of Rule 56(c), the Supreme Court chose not to address the issue in 1955 and "took no action" on the proposed amendment to Rule 56(c). (Letter from Professor Benjamin Kaplan to Chairman and Members of The Advisory Committee on Civil Rules, November 3, 1960 ("Kaplan letter dated 11/3/60")). Contrary to Petitioner's review of the history behind this Rule, the story does not end with the discharge of the Advisory Committee as recounted in 4 Wright & Miller, *supra* § 1006, at 34. In 1960, another Advisory Committee again considered this change to Rule 56(c). Kaplan letter dated 11/3/60. As the Reporter for the

Committee, Professor Kaplan provided a Summary Statement on 1955 Proposed Amendments in which he stated the following with respect to Rule 56(c):

> XV. Changes in summary judgment provisions (Memo XV). – (A) Summary judgment against the moving party (Rule 56(c)).
>
> **Under the cases, where a party moves for summary judgment and it appears that he is not entitled to such judgment but his opponent is, courts have felt free to direct appropriate judgment without requiring the opponent to make a cross-motion. The amendment would make clear that the practice is proper.** As now drafted the amendment is unclear whether judgment on a motion for summary judgment may go for or against any party, or only for the moving party or his adversary on the motion. This is not a serious matter, but we have drafted alternative forms for the Committee's consideration.

(Emphasis added). Professor Kaplan went on to comment that:

> Where, upon the motion, it appears that the moving party must fail in the action or some part of it, the expeditious thing to do is to render judgment. To require a cross-motion is to go through a useless formality.
>
> * * *
>
> Most of the comments received by the Advisory Committee on the proposal as first made in 1954 were reported as being favorable. Since 1955 lower Federal courts have continued to dispense with the cross-motion. . . . No Federal decisions have been found during this period going the other way.

(Enclosure No. 1 to Kaplan letter dated 11/3/60 at 14).

In December of 1960, the Advisory Committee met and discussed the proposed changes to Rule 56(c). The minutes of that meeting reflect that "[a]fter discussion it was decided that the present rule was working rather well and the entire Committee felt that no change should be made in the rule." Minutes of the December 1960 Meeting of the Advisory Committee on Civil Rules. In other words, the Advisory Committee determined that there was no need to change the rule since the courts were already (where appropriate) directing judgment in favor of a deserving nonmoving party.

Here, the appellate court had a fully briefed motion for summary judgment before it, and a clear record on which it could establish, on undisputed facts, that one party was entitled to judgment as a matter of law. The fact that the party so entitled was the nonmovant does not detract from the propriety of the court's actions. The court's decision was entirely consistent with both the letter *and* spirit of Rule 56(c). Its decision was proper and in accordance with the established jurisprudence applying the rule. There is no need for this Court to clarify an already settled principle of law.

2. There Was No Departure From The Accepted And Usual Course Of Judicial Proceedings Requiring This Court's Intervention

"Review on a writ of certiorari is not a matter of right . . . ." Sup. Ct. R. 10. It is solely a matter of this Court's discretion. A petition for a writ of certiorari will be granted only for compelling reasons, such as where "a United States court of appeals . . . has so far departed from the ***accepted and usual*** course of judicial proceedings, . . . as to call for an exercise of this Court's supervisory power . . . ." *Id.* (emphasis added). Sharp's petition for writ of certiorari rests upon its contention that the court of appeals departed by a wide margin from the accepted and usual practice of judicial proceedings. In fact, the Fourth Circuit did nothing of the sort; to the contrary, its action was consistent with the "accepted and usual" course of practice.

The decision of the Fourth Circuit was in accord with every circuit court that has addressed the issue. *Mullen v. St. Paul Fire & Marine Ins. Co.*, 972 F.2d 446, 452-53 (1st Cir. 1992) (reversing district court and holding that judgment should be entered for nonmoving party despite its failure to oppose summary judgment motion); *Coach Leatherwear Co.*,

Inc. v. AnnTaylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991) (recognizing practice of granting summary judgment for nonmoving party as accepted method of expediting litigation); *Viger v. Commercial Ins. Co.*, 707 F.2d 769, 774 (3d Cir. 1983) (reversing district court and ordering entry of summary judgment for nonmoving party), *cert. denied*, 483 U.S. 1020 (1987); *Uzzell v. Friday*, 547 F.2d 801, 805 (4th Cir. 1977) (court clearly has authority to grant summary judgment for the nonmoving party), *vacated on other grounds*, 438 U.S. 912 (1978); *In re Cont'l Airlines*, 981 F.2d 1450, 1458-59 (5th Cir. 1993) (recognizing power of court to render summary judgment for nonmoving party); *Trs. of Michigan Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 594-95 (6th Cir. 2000) (where facts are uncontroverted and proper disposition clear, court may direct entry of summary judgment for nonmoving party); *Morgan Guar. Trust Co. v. Martin*, 466 F.2d 593, 600 (7th Cir. 1972) (court has power to direct summary judgment for nonmoving party when just under the circumstances); *Martinez v. United States*, 669 F.2d 568, 570 (9th Cir. 1981) (under proper circumstances, appellate court may order district court to enter summary judgment for nonmoving party); *Dickeson v. Quarberg*, 844 F.2d 1435, 1444 n.8 (10th Cir. 1988) (finding that the "weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56") (citation omitted); *Fabric v. Provident Life & Accident Ins. Co.*, 115 F.3d 908, 914 (11th Cir. 1997) (power of appellate court to order summary judgment for nonmoving party widely recognized); *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 394 (Fed. Cir. 1997) (court has authority to direct entry of summary judgment for nonmoving party if circumstances warrant such disposition); *Leahy v. District of Columbia*, 833 F.2d 1046, 1047 (D.C. Cir. 1987) (recognizing power of court to render summary judgment for opposing party even though that party has not moved under Rule 56). *See also*

Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) (entry of summary judgment *sua sponte* appropriate in certain circumstances).[3]

When the facts are sufficiently developed at the summary judgment stage such that the court of appeals can determine that the nonmoving party is entitled to judgment as a matter of law, entry of judgment for the nonmoving party is proper. 10A Wright & Miller, *supra*, § 2720 at 345 (citing *Coach Leatherwear*, 933 F.2d 162 at 167).[4] Courts of appeals not only reverse the district courts, but also routinely

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[3]The term *sua sponte* literally means "of his or its own will or motion." Black's Law Dictionary 1424 (6th ed. 1990). Courts and commentators generally reserve the term for those situations in which neither party has moved for summary judgment and the court enters judgment solely on its own initiative, a circumstance which raises concerns of advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted. 10A Wright & Miller, *supra*, § 2720 at 339 (1998 & Supp. 2000). Those concerns are lessened where, as here, one party has moved for summary judgment.

> Entering a judgment when there has been a motion but no cross-motion is somewhat different from the situation in which neither party has moved under Rule 56 and the court wishes to act *sua sponte*. When there has been a motion but no cross-motion, the judge already is engaged in determining whether a genuine issue of material fact exists and the parties have been given an opportunity to present evidence designed either to support or refute the request for the entry of judgment.

Id. § 2720 at 345-46.

[4]This practice is in keeping with the mandate of Rule 54(c), that the court grant relief to which a party is entitled "even if the party has not demanded such relief in the party's pleadings."

direct the district court to enter judgment for the nonmoving party. *See, e.g., Fabric,* 115 F.3d at 915 (in light of the record, the direction of summary judgment for the nonmoving party on appeal does not result in procedural prejudice); *In re Cont'l,* 981 F.2d at 1458-59 (reversing bankruptcy court's order granting summary judgment and finding based on undisputed facts nonmoving party entitled to summary judgment as a matter of law); *Morgan Guar.*, 466 F.2d at 600 (matter was simple case, with simple facts and record revealed no genuine issues of material fact for trial). The court of appeals, following the principle of *stare decisis*, acted within the established practice and norms under Rule 56.

3. The Grant Of Summary Judgment Was On A Sufficiently Developed Record

Judicial economy warrants the entry of summary judgment by the appellate court upon a record sufficiently developed to support that judgment. *Fabric,* 115 F.3d at 915. The central issue in this case is whether Respondent's May 23 fax represented (i) an unauthorized attempt to unilaterally modify a bilateral contract or (ii) a rejection of Petitioner's unilateral offer in the Floorplan Repurchase Agreement and the offer by Respondent of new financing terms. The court of appeals had before it *all* material facts pertinent to its decision.[5] The legal issues were sufficiently briefed. The

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[5]Petitioner suggests that Respondent disputed the factual record upon which the court of appeals based its decision. In fact, Respondent's position before the district court and the court of appeals was not that it disputed the facts upon which those courts based their decisions. Rather, Respondent urged that there were additional, material facts which were in dispute and, therefore, precluded the entry of summary judgment in favor of Petitioner. Both the district court and the court of appeals concluded

(continued...)

court of appeals correctly decided that there were no disputes of material fact that precluded summary judgment and that the Respondent was entitled to judgment as a matter of law.[6] It would have been a waste of judicial resources to remand the case for trial, where, as here, there was no genuine issue of material fact.

The grant of summary judgment in favor of Respondent is consistent with 28 U.S.C. § 2106 (1994 & Supp. IV 1999), which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Petitioner was not deprived of an opportunity to address Respondent's legal and factual contentions. Petitioner had an opportunity to examine and reply to Respondent's argument

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that those disputed facts cited by Respondent were immaterial to a determination of the case.

[6]The court of appeals agreed with Respondent, finding that Respondent's May 23 letter was a counteroffer which Sharp had notice and accepted.

that it had not breached its agreement with Petitioner and would ultimately be entitled to judgment.

Both parties had ample opportunity to present arguments and the relevant facts regarding whether or not Respondent breached the Floorplan Repurchase Agreement. *See, e.g., Nat'l Expositions, Inc. v. Crowley Mar. Corp.*, 824 F.2d 131, 134 (1st Cir. 1987); *Lindsey v. United States Bureau of Prisons*, 736 F.2d 1462, 1463-64 (11th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982); *McKenna v. Peekskill Hous. Auth.*, 497 F. Supp. 1217, 1219-20 (S.D.N.Y. 1980), *rev'd in part on other grounds*, 647 F.2d 332 (2d Cir. 1981). Notice for purposes of granting summary judgment for the nonmoving party depends upon "whether, given the procedural circumstances of the case, 'the original movant has had an adequate opportunity to show that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law.'" *Nat'l Expositions*, 824 F.2d at 133 (citing Wright & Miller, *supra,*, 2720 at 34 (1983)). "A party cannot complain of lack of a reasonable opportunity to present all material relevant to a motion for summary judgment when both parties have filed exhibits, affidavits, counter-affidavits, depositions, etc. in support of and in opposition to a motion to dismiss." *In re G.&A. Books, Inc. v. Stern,* 770 F.2d 288, 295 (2d Cir. 1985) (no surprise in conversion of Rule 12(b)(6) motion into one for summary judgment where parties submitted materials beyond the record), *cert. denied*, 475 U.S. 1015 (1986); *Madewell v. Downs,* 68 F.3d 1030, 1048 (8th Cir. 1995) (court's failure to give formal notice that it will render summary judgment harmless where nonmoving party has submitted materials outside pleadings in support of resistance to motion, or where nonmoving party has had adequate opportunity to respond to motion and there is a lack of any dispute of material fact or any fact missing from the record). This principle applies here

with equal, if not greater, weight. As noted *supra*, Petitioner had more than an adequate opportunity to demonstrate that there was a genuine issue of fact and that Respondent was not entitled to judgment. Petitioner submitted a motion for summary judgment, arguing that Respondent breached the Floorplan Repurchase Agreement, a reply to Respondent's opposition to that motion, an opposition to Respondent's motion for reconsideration, an appellee brief, and a motion for reconsideration. In each of these five papers, Petitioner fully argued why Petitioner believed Respondent was in breach of the Floorplan Repurchase Agreement, *i.e.*, why Respondent was not entitled to judgment as a matter of law. Having sufficiently briefed and presented the relevant undisputed material facts on this issue, Petitioner suffered no prejudice.

This case does not present any special or important reasons favoring review. The instant matter is a garden variety commercial case which involves the application of established principles of state law. This Court has long observed that the writ of certiorari should be reserved for special matters of public importance. *See Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) (observing that "it is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public . . . and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit[s] . . . ."). There is simply an absence of any issue of public importance or embarrassing conflict between the circuits to warrant the review of this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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